IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No.297 of 1992

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-
and
HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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COMMISSIONER OF INCOME TAX

Versus

I G GANDHI SILK MILLS LTD.

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Appearance:

MR BB NAIK for Applicant No. 1

MR MANISH J SHAH FOR MR JP SHAH for Respondent No. 1

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CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 19/01/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. The Income Tax Appellate Tribunal Ahmedabad Bench 'C' has referred the following question under Section

256(1) of the Income Tax Act, 1961 (the Act) at the instance of the Commissioner of Income Tax, Surat :

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the liability pertaining to excise duty in the present case was an "ascertained liability" within the meaning of that expression in clause (c) of explanation in sec. 115J(1) of the I.T. Act, 1961 ?"

2. The Assessment Year is 1988-89 and the relevant accounting period is the year ended 31st October, 1987. The assessee, a Private Limited Company, worked out assessable income at Rs. NIL but the return of income declaring total income of Rs.15,732/- under Section 115J of the Act was filed on 30th June, 1988. Net profit as per Profit & Loss A/c. was Rs.52,439/-. The Assessing Officer computed taxable income under provisions of Section 115J of the Act at Rs.10,46,800/- by adding back undischarged excise liability of Rs.57,52,339/-. Except for mentioning in the computation portion that the said liability was in dispute the Assessing Officer has not mentioned any other facts or reasons for making the addition.

3. The assessee carried the matter in appeal before the C.I.T. (Appeals) who, vide his order of 31st July, 1990 upheld the action of the Assessing Officer by holding that the said liability was covered by Clause (c) of Explanation to sub-section (1) of Section 115J of the Act.

4. The assessee filed second appeal before the Tribunal and the Tribunal reversed the orders of both the lower authorities vide its order of 8th January, 1992. It has been held by the Tribunal that the excise duty liability was a statutory liability. That the said liability had accrued in the relevant accounting year. That it was an ascertained liability although the same was disputed. The contention raised on behalf of the Revenue to the effect that there was no liability at all in the relevant accounting year was not accepted.

5. Mr.B.B.Naik, learned Standing Counsel appearing on behalf of the applicant - Revenue, submitted that the question referred to the Court was required to be answered in light of the unreported decision rendered by this Court in case of Commissioner of Income-Tax Vs. Aruna Mills Limited on 15-02-2001 in Income Tax Reference No.121 of 1989. It was submitted by Mr.Naik that a liability which was based on a show-cause notice would be

a contingent liability and as such not allowable, i.e. it could not be deducted for the purposes of working out book profit as envisaged by provisions of Section 115J of the Act. According to Mr.Naik the Tribunal had merely observed that the assessee was in receipt of notices from the Excise Department and in these circumstances the Tribunal had committed an error in treating the liability based on such notices as ascertained liabilities. Elaborating on the submission it was contended that the Tribunal had not found that the liability was based on any notice of demand and coupled with the fact that the liability was disputed by the assessee it was wrongly held to be an ascertained liability and deductible.

6. Mr.Manish J. Shah, learned advocate appearing on behalf of the respondent - assessee, submitted that the dispute as to whether the liability was on the basis of a show-cause notice simpliciter or on the basis of a demand notice was never raised at any stage before the Tribunal and in the circumstances the Revenue must not be permitted to urge the same at this stage. Alternatively, it was submitted that, he had instructions from the Chartered Accountant, who had appeared before the Tribunal, to state that the liability was based on a notice of demand and the dispute raised on behalf of the Revenue was, therefore, without any basis. He, therefore, submitted that in light of the ratio enunciated by the Apex Court in the case of Commissioner of Income Tax Vs. Bharat Carbon and Ribbon Manufacturing Co. P. Ltd., [1999] 239 ITR 505 the Tribunal had rightly held that the excise duty liability was an ascertained liability and could not be included for the purposes of working out tax liability under Section 115J of the Act.

7. Responding to the submission made on behalf of the assessee, Mr.Naik submitted that in the alternative the matter be restored to the file of the Tribunal for the purposes of ascertaining the facts, in absence of any clear finding recorded by the Tribunal on this aspect. The said submission was resisted by Mr.Shah.

8. Section 115J, which is a special provision relating to certain companies as is relevant for the present reads as under :

"Special provisions relating to certain companies

115J. (1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee being a company,

the total income, as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 1988 (hereinafter in this section referred to as the relevant previous year) is less than thirty per cent of its book profit, the total income of such assessee chargeable to tax for the relevant previous year shall be deemed to be an amount equal to thirty per cent of such book profit.

Explanation : For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared in accordance with the provisions of Parts II and III of the Sixth Schedule to the Companies Act, 1956 (1 of 1956), as increased by--

(a) the amount of income-tax paid or payable, and the provision therefor; or

(b) the amounts carried to any reserves, by whatever name called; or

(c) the amount or amounts set aside to provisions made for meeting liabilities other than ascertained liabilities; or

(d) the amount by way of provision for losses of subsidiary companies; or

(e) the amount or amounts of dividends paid or proposed; or

(f) the amount or amounts of expenditure relatable to any income to which any of the provisions of Chapter III applies,

if any such amount is debited to the profit and loss account, and as reduced by,--"

9. On a plain reading of the provision it is apparent that in case of a company, whose total income as computed under provisions of the Act for any Assessment Year commencing on or after 1st April, 1988, is less than thirty per cent of the book profit, the total income that would be chargeable to tax in case of such an assessee shall be deemed to be an amount equal to thirty per cent

of such book profit. However, the term "book profit" which is defined by the Explanation to sub-section (1) of Section 115J of the Act gives rise to the controversy. "Book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared in accordance with the provisions of Parts II and III of the Sixth Schedule to the Companies Act, 1956; the said figure has to be increased by the various amount as per clauses (a) to (f) and is required to be reduced by amount as per clauses (i) to (iii). For the present only clause (c) of the Explanation is relevant. The net profit figure arrived at in the profit and loss account is required to be increased by 'the amount or amounts set aside to provisions made for meeting liabilities other than ascertained liabilities'. It is in light of this requirement of the provisions that the finding recorded by the Tribunal will have to be tested and appreciated.

10. However, before adverting to the facts found by the Tribunal it is necessary to take note of the decision of the Apex Court in the case of C.I.T. Vs. Bharat Carbon and Ribbon Manufacturing Co. P. Ltd. (supra) which has laid down as to when can it be stated that liability to pay excise duty has been incurred by an assessee in the following words :

" In the present case, the liability accrued over the accounting period because of demand notice issued by the Excise Department. The said demand notice was issued after the show-cause notice and on the basis of the trade notice issued by the Collector of Customs in October, 1979, providing that coated paper would be liable to be classified under the tariff item No.17(2). The obligation under the law to pay the excise duty arose at that stage. Raising of the dispute by the assessee by filing the writ petition for quashing or deduction of the said liability would not be a ground for holding that liability to pay the excise duty as per the demand notice was not incurred."
(emphasis supplied)

11. The Tribunal has found after perusal of the annual report and the audited accounts that the report by the Chartered Accountants is not qualified; that profit and loss account and the balance-sheet have been prepared in accordance with provisions of Parts II and III of Sixth Schedule to the Companies Act, 1956. It has further been found that "The assessee had received notices in respect of the amount in question from the

Excise Department. Bank guarantee was demanded from the assessee in respect of that amount." The Tribunal has further held that though the excise duty liability was disputed it was an ascertained liability and had accrued in the relevant accounting year. While rejecting the contention of the Revenue that there was no liability at all in the relevant accounting year the Tribunal has further found that "On the facts of this case it must be held that it was an ascertained liability."

12. Therefore, in light of the aforesaid findings of fact recorded by the Tribunal, there is no infirmity in the order of the Tribunal which would require the Court to hold that the Tribunal had committed any error in law. In so far as the contention raised on behalf of the Revenue is concerned, it is apparent that the said contention was specifically raised before the Tribunal and the Tribunal has categorically found that the liability was an ascertained liability and rejected the submission that there was no liability. It is necessary to reiterate the legal position that the findings of the Tribunal have to be appreciated in the context of the facts and evidence before the Tribunal and the submissions made by the parties before it. In Paragraph No.4 submission on behalf of the assessee has been recorded by the Tribunal that demand notices had been received by the assessee from Excise Department. Further down in the same paragraph while recording the submission made by the departmental representative also, it was recorded that "It was further submitted that since the assessee had received mere demand notice from the Excise Department, .....". Therefore, it is clear from an overall reading of the impugned order of the Tribunal that before the Tribunal it was an admitted position between the parties that the assessee was in receipt of demand notices from the Excise Department, and that liability which the assessee was required to discharge by virtue of such demand notices was disputed. If that were not so, there was no necessity to call upon the assessee to furnish bank guarantee. It has further been found that the assessee had provided for such liability in its books as reflected by its profit and loss account and the balance-sheet, which were maintained in accordance with statutory requirement under the Companies Act.

13. In the circumstances, it is not possible to state that the Appellate Tribunal had committed any error in law when it held that liability pertaining to excise duty in the present case was an ascertained liability within the meaning of that expression in clause (c) of Explanation to Section 115J(1) of the Act. Accordingly,

question referred to this Court is answered in the affirmative i.e. in favour of the assessee and against the Revenue.

14. The Reference stands disposed of accordingly. There shall be no order as to costs.

Sd/- Sd/-

[ D.A.MEHTA,J ] [ H.N.DEVANI,J ]

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'Bhavesh'